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On Reason and Authority in Law's Empire

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ON REASON AND AUTHORITY IN *LAW'S EMPIRE*

Law's Empire will shape jurisprudence by its admirably resourceful attention to understanding a community's law "internally". It promotes reflective understanding of the *practical argumentation* constitutive of the attitude(s) in which that law subsists. But the book neglects some of practical understanding's resources of political and moral theory, and overestimates practical reasoning's power to identify options as the best and the right.[1]

I.

The book "takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face" (14).

Of course, this "joining" is, at least for the most part, an "only 'virtual'" (422) participation; jurisprudence, as such, is only a propaedeutic to, or reflection upon, choosing; it is not itself a choice such as the participants themselves must make, to authorise or withhold, or to risk or accept, coercion – and take the consequences. But

[1] All parenthetical and/or otherwise unattributed numbers are references to pages of *Law's Empire*. I shall pass over many good things in the book: its neo-classical identification (413) of the ontological basis of law in an attitude (*voluntas, habitus*) rather than in propositions, processes or persons as such; its identification, alongside its healthy individualism in ontology and epistemology, of the practical and moral reality of corporate responsibility ("personification") (167, 172, 296); its critique of two-level utilitarianism (290) and its comments on "academic" and "practical" elaboration of moral/political theory (285–87); its elaboration of community in terms of fraternity; its link between the theory of law, the theory of evil law, and the force of good law (110–11).

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Dworkin rightly insists that jurisprudential work, insofar as it bears on the situation of some contemporary community, is genuinely continuous, indeed homogeneous, with the practical reasoning which characteristically precedes actual legal choices (legislative, judicial, or private) in that community: "no firm line divides jurisprudence from adjudication or any other aspect of legal practice.... Jurisprudence is ... silent prologue to any decision at law" (90; see also 380). The *theory* rather confusingly labelled "law as integrity", but proposed as an alternative to the theories labelled conventional*ism* and pragmat*ism*, "offers itself as continuous with – the initial part of – the more detailed interpretations it recommends" (226). And since the opportunity (or lack of opportunity) to make a choice – to literally join a practice and take the consequences – does not affect the argumentative content of practical reasoning, the jurisprudential method envisaged is equally available, in principle, to guide the study of communities and laws foreign to us, or past.

Dworkin thus identifies argumentation (the argumentativeness of legal practice: 14) as centrally constitutive of the social phenomenon of law. Taking my cue from that, I have spoken here of practical reasoning.[2] But that is not a term which Dworkin promotes. Instead, he prefers to speak of *interpretation*. Now "interpretation" is usually understood as, in a sense, passive or at least derivative, whereas practical reasoning, reasoning towards choice and action, is understood as active and creative. And indeed, Dworkin sometimes finds in the passivity or derivativeness implicit in the terminology of his master-concepts (amongst which *interpretation* has perhaps pride of place) a tacit and, I think, illicit support for his court-focussed concept of law. Consider, for example, his brief *obiter dictum* about legislation: it is "the practice of *recognizing as* law the explicit decisions of special bodies widely assumed to have that power [scil. of legislating]" (99, emphasis added). Shuffled out of view is the law-creating role and

[2] Of course, Dworkin often speaks, as we have seen, of law as a *practice*. But it is clear that he uses the term "practice" to include any way of thinking or arguing, any "methods [a social scientist's] subjects use in forming their own opinions..." (64).

practice of legislatures; their responsibilities to engage in practical reasoning with an eye to the common good and the Rule of Law as Fuller outlined it thus never come into focus.

But I am running ahead, and pointing to a weakness when, for the present, I want to dwell upon the illuminating strength of certain of the book's guiding conceptions. Notable amongst these is certainly its author's willingness to endow his term or concept, *interpretation*, with much of the richness of practical reasoning's creative engagement with *goods* (including of course their privation: harms) and *ends* or *purposes*. Of the three terms I have just italicised, Dworkin really promotes only the term "purpose"; but above all he emphasises, massively, their functional equivalent: the role of *point* in interpretation.

The interpretative[3] attitude towards a practice assumes, he says, that the practice "has value, that it serves some interest or purpose or enforces some principle – in short that it has some point" (47). Indeed, in the case of some practices (such as the law) but not others (such as tennis), the interpretative attitude makes another assumption: that the requirements of the practice are "sensitive to its point", i.e., are to be "understood or applied or extended or modified ... by that point" (47).

But at this juncture (which, as he says, is foundational for the whole book: 50), Dworkin shifts gear. The point or, synonymously here, the meaning of the social practice in question (courtesy, or law) is he says, to be "imposed" (47).

> Interpretation of ... social practices ... is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong (52).

This last assertion leaves much unclear. Is the interpreter supposed to

[3] Using a "relaxed" and therefore (358) "liberal" conception of the requirements of fit, I shall take as normative the usage established by the repeated use of "interpretative" on p. 107, and, seeking to put the book in "the best light" by a constructive interpretation, shall treat the appearance elsewhere of "interpretive" as a mere *lapsus calami*, a "mistake".

have some other purpose than the formal purpose of making the object as good an instance of a genre as it can be? If genres provide the basis or framework of this formal purpose of interpretation, whose and what purposes inform and make the genre what it is? Dworkin does not stay to consider these issues. Indeed, what carries him towards his rather puzzling affirmation of the constructiveness of interpretation seems partly to be an equivocation on the word "creative". Interpretation of art and social practice is to be called "creative" because it aims "to interpret something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation" (50). The syntax of our language makes this use of "creative" hazardously equivocal between the thus announced meaning ("pertaining to the created") and the meaning ("creative of...") which is suggested by the metaphors of "imposing" and "constructing" meaning and purpose.[4]

The difficulties here are by no means all of Dworkin's own making. We can, as I have suggested elsewhere, usefully bear in mind four orders of intelligibility: the order (of nature) which is in no way established by human understanding; the order (studied by logic, methodology and epistemology) which one can bring into one's own understanding; the order which one can bring into objects (boats, phonemes, poems, constitutions) by making them according to an intelligible plan or purpose; and the order which one can bring into one's dispositions, choices and actions. By calling the interpretation which bears on law "creative", Dworkin seems to place it in the third order (of making, *poeisis, factio*) rather than the fourth (doing, *praxis, actio*). Aristotle, Aquinas and the classic Western tradition down to Bentham's uncomprehending attack upon it chose to envisage law

[4] Dworkin is clear that the official meaning of "creative" in his use of "creative interpretation" is simply "of a created object", and that, accordingly, "interpretation is by nature the report of a purpose; it proposes a way of seeing what is interpreted ... as if this were the product of a decision to pursue one set of themes or visions or purposes, one 'point', rather than another" (58–59).

(like the other main aspects of political reality) in the fourth order: law has its principal intelligibility as a guide to choice, proposed to a community of choosers by the choice of that community's law-makers.[5] Still, one of law's usually characteristic features is that it has part of its reality as symbols or formulations, which are created objects in the third order, brought into being by legislation (including judicial fiat) and thereafter imbued with a reality independent of the intentions and choices of their maker(s) – a reality which thus creates a problem for interpretation distinct from the problem of interpreting those intentions and choices as *acts*. Moreover, we cannot say that when Dworkin calls legal interpretation "creative" he thereby locates it in the third order as opposed to the fourth, for he does not seem to have any such distinction in mind. But we can say that it would have been helpful if he had. For there is something distracting about his appeal to the interpretation of artistic creations as the paradigm of the activity (let us allow, for the present, that it is interpretative) involved in the practice of law and legal argumentation, a practice which at bottom seeks to bring order into human choices and actions, present and future.

Of course, law in its central instantiations seeks to regulate present decisions and future conduct (*acta, agibilia, agenda*) primarily by attending to entities (rules, orders, precedents...) already existing because somehow brought into being in the past (*facta*). Dworkin acknowledges this explicitly by embracing "the assumption that the most general point of law, if it has one at all, is to establish a justifying connection between past political decisions and present coercion" (98).[6] But the acknowledgement leaves something to be desired, because this statement of "the most general point of law" revives or continues the puzzle about *whose* purposes or point are the primary or fundamental subject-matter of jurisprudential reflection upon law. Here, particularly, who is supposed to be doing the "establish-

[5] See, e.g., Aquinas, *in Eth.* 1, 1; *Summa Theol.* I–II, q. 90 aa. 1–4. On the four orders, see Finnis, *Natural Law and Natural Rights*, pp. 136–39, 157.

[6] "The heart of any positive conception of law ... is its answer to the question why past politics is decisive of present rights" (117).

ing"? The judge or jurist, now deliberating about the coercion which might now be ordered and, if so, justified by relation to the past decisions? Or the past decision-makers, who made their decision(s) with a view to *establishing* a justification – subsisting until terminated by preordained expiry or a new decision – for future (including now present) coercion (and, as Hart would wish to remind us, other present and future social law-regarding conduct)?

If, as the paradigm of interpretation suggests, the establishing of the justifying connection with the past is the work (and purpose) of the judge or jurist, still it is done as a moment in a process of justifying present choice and future conduct. It is done, in other words, in the course of a process of practical reasoning – indeed, reasoning towards choice and action, *praxis* – in which the justifying relevance of the past decisions (enactments, precedents, customs, etc.) must compete with countervailing considerations of expedience and principle. *In that respect*, this judicial or juridical process of reasoning or argumentation resembles – and has *pro tanto* the same point as – the reasoning which must precede any justified act of legislative decision-making.

And if we take the other alternative, and suppose that the justifying connection is established primarily in the legislative decision and act, the *point* of legislating is, even more obviously, in need of further identification. Classically, that point was identified as promoting the common good of the community for which the legislature is responsible. But that must be elaborated so as to articulate a more specific point, going to the legal form in which authority is thus exercised. This more specific point is summarised by the phrase "The Rule of Law", a multiform point analysed by Fuller, Raz, and others in terms of the *desiderata* of formally or structurally good law-making. But this is scarcely attended to by Dworkin.[7]

In short, interpretation according to Dworkin is to be understood on the model of purpose, practical reasoning, and intention. This understanding lends power and illumination to his account of the interpretative attitude and its role in and in relation to law. But there

[7] "General theories of law, for us, are general interpretations of our own judicial practice" (410). Why be so narrow?

is an irreducible passivity or derivativeness about the concept of interpretation, even after it has been transmuted by Dworkin from "of created reality" to "a creating and imposing of the interpreter's purpose" (and after "construction" has likewise slid from "construing" to "creation").[8] Interpretation resists being taken for the whole of practical reasoning; or, perhaps more clearly, practical reasoning – e.g., political *praxis* – resists being rendered as "interpretation of a practice". Adjudication and juristic interpretation resist being taken for the constitutive and legislative moments in the life of the law; those moments resist being understood, through and through, as interpretative. These resistances show up as missing or underdeveloped elements in the book's depiction of law's empire – an empire which is thus treated as if it were *acquired* in the way the British (some say) once acquired theirs: in a fit of absence of mind.

In short: even if Dworkin succeeded in showing that his account of interpretation and the interpretative attitude in legal practice is the best account, he would not thereby have shown (nor does he otherwise show) that law and legal practice and its point are adequately described and explained by that account.

II.

There is more to be said about the book's epistemology before I turn to a more orderly treatment of its political and jurisprudential theory. The "internality" of fruitful jurisprudence has a dimension or implication which goes beyond simply the resolve to understand legal phenomena as they are understood by those whose understanding and intending of them make them what they are. This further dimension or implication is in play in the book's discussion of "internal" and "external" scepticism (76–86). This discussion restates points made,

[8] Of course, the transmutation or slide does not go the whole way, but remains in the tension established by the requirements of "fit" and "soundness", the former tending to hold the interpreter to the pre-interpretative reality established by other people's purposes, practical reasoning and intention(s).

perhaps more crisply and tellingly, in several recent articles by Dworkin. The correctness or otherwise of a legal answer to a legal question, or of a moral answer to a moral question, can be determined only by one who enters into the legal, or moral, arguments and uses legal, or moral, criteria to judge one answer better than another. From within the practices of legal and moral argument, the disagreements noted by the external sceptic are simply irrelevant – no argument at all. Arguments against the objectivity or truth of a particular legal or moral claim are worthless unless they are legal or moral arguments. The external sceptic's denials that such claims can or do correspond to "transcendental reality" or "the fabric of the universe" trade on unexplained, indeed "incomprehensible"[9] metaphors, and are empty and futile.

Law's Empire concludes that "the only skepticism worth anything is skepticism of the internal kind" (86; see also 82). Internal scepticism accepts that some social practices (or other objects of interpretation) are better than others but denies that a particular object of interpretation has any of the worth attributed to it by its participants and those who share their interpretative attitude. But this conclusion is stated without the éclat of chapter 7 of *A Matter of Principle*. Indeed, *Law's Empire*'s official position (80, 266) is that neither the general significance nor the rightness of external scepticism need be considered in the book or, it seems, in any other jurisprudential (or political or moral) reflections.

The truth that even widespread disagreement is no argument against a moral or legal assertion has an equally important counterpart: the fact of one's agreement with an assertion is no ground for agreeing. In the logic of argumentation, only the *content* of my knowledge or beliefs is relevant, not the fact that I possess them. Albeit in a rather specialised context (331–32), Dworkin very clearly adverts to this "transparency" of "I believe that *p*" for "It is true that

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[9] *A Matter of Principle*, 172. See, for the arguments paraphrased in this paragraph, *ibid.*, pp. 137–42, 171–77; Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (1984), 277–80; *Taking Rights Seriously* (1978), pp. 123–24.

p" and "*p*". He also states the implication of this transparency, viz., that in making any affirmation, reaching any conclusion, answering any question, one is "relying at the deepest level on what [one oneself] believes" (314). Dworkin's writings taken together make it clear that he rejects any subjectivist reading of this; in relying (say, for the premisses of an argument) on what one believes, one relies on it under the description *what is* [or: *seems to be*] *the case*, not under the description *what I believe about* what is the case.

But I doubt whether Dworkin has focussed sufficiently on the implications of these positions. In my Maccabaean Lecture,[10] I noted that his arguments against enforcement of "majority preferences" fail to observe the transparency of many beliefs held and acted upon, *by* majorities, but not *because* they are so held. *Law's Empire* does not take up those arguments, so I need not restate that point. But it is worth noting here how often the book speaks in a way which, by syntactically overlooking transparency, gives needless (and, I believe, unintended) comfort to a subjectivist reading of the book and a subjectivist understanding of ethical, political and legal theory. Consider the italicised redundancies in the following key statements:

(i) "the exercise in hand is...: discovering which view of the sovereign matters we discuss sorts best with *the convictions we each, together or severally, have and retain about* the *best account of* our common practices" (86).

(ii) "Justice is a matter of the correct or best theory of moral and political rights, and anyone's conception of justice is his theory, *imposed by his own personal convictions*, of what these rights actually are" (97).

(iii) "Hercules is not trying to reach *what he believes is* the best substantive result, but to find the best justification he can of a past legislative event" (338).

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[10] 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence', *Proc. Brit. Acad.* 71 (1985) at 309–11.

Or again: Perhaps Dworkin needed to say that the good judge decides a hard case "by employing his own moral convictions" (120), for he needed to make clear that the criteria of soundness ultimately used by the judge are of soundness as assessed by him, and not, in the last analysis, as assessed by (other members of) society. But he would have done well to add, immediately, that the judge does not employ his moral convictions *as* his but *as sound* criteria, principles, rules or other factors relevant as premisses in an argument.[11]

Finally, Dworkin seems to give relativists – legion amongst law students – needless (and again, I think, unintended) comfort by extending his denials much wider than was called for by the metaphorical metaphysics of the external sceptic. For Dworkin says that "the practices of interpretation and morality give these claims [about *Hamlet* and about the wrongness of slavery] *all* the meaning they need *or could* have" (83, emphases added); and "the 'objective' beliefs most of us have [about such matters] are moral, not metaphysical, beliefs" (82). True, those practices and beliefs do not include the external sceptics' bugaboos, "transcendental reality", "the fabric of the universe", the "out there", etc. But they do, commonly, include or presuppose conceptions of what counts as human flourishing, and these conceptions not only presuppose some beliefs about the nature of things (e.g., freedom of choice, continuity of personal identity),[12] but also contribute to (the rational justification of) other beliefs about the nature of that (human) type of being whose flourishing could involve the opportunities and responsibilities which moral judgments assert it does. The truth that practical knowledge cannot be deduced from theoretical does not entail that there is no ontology of morals, or that ethics has nothing to learn from and nothing to contribute to the metaphysical understanding of our nature and our world.

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[11] Similarly, it is a pity Dworkin uses "conviction", rather than "consideration", "factor", "argument", or "principle", is passages such as: "The constraint fit imposes on substance ... is therefore the constraint of one type of political *conviction* on another in the overall judgment [by?] which interpretation makes a political record the best it can be overall" (257, emphasis added).

[12] As Dworkin himself says, one's view about the point of law must rest on "large questions of personality, life, and community" (101).

III.

Epistemological or methodological issues closer to the central concerns of jurisprudence are raised by Dworkin's account of the "semantic sting" and his rendering of legal positivism, legal Realism, and natural law theory into "semantic theories of law". Here the book seems to me confused and seriously misleading.

The "semantic sting" is Dworkin's name for "the argument that unless lawyers and judges share factual criteria about the grounds of law there can be no significant thought or debate about what the law is" (44). "Semantic theories suppose that lawyers and judges use mainly the same criteria ... in deciding when propositions of law are true or false..." (33).

One notices at once the lack of quantification of "share factual criteria": share some, share many, share all? The second passage says: "mainly". But if *this* belief is fallacious – a poisonous sting to be drawn – it seems indistinguishable from Dworkin's own belief that "the lawyers of any culture where the interpretive attitude succeeds must largely agree at any one time" – agree, that is, "about what practices are legal practices", and about "legal paradigms, proposition[s] of law like the traffic code that we take to be true if any are" (91). When stating his view that such "pre-interpretive" agreement is a necessary precondition of any flourishing interpretative, critical or juristic enterprise, Dworkin claims that his view differs from the semantic sting in not supposing "that we identify these institutions [and paradigms] through some shared and intellectually satisfying definition of what a legal system necessarily is and what institutions necessarily make it up" (91).

But the latter supposition seems quite distinct from the suppositions earlier said to constitute the semantic sting and the semanticism of semantic theories of law – suppositions which, as we saw, made no assertions about "what a legal system necessarily is", but were identified by Dworkin as claiming that the criteria of "*the* law" which are used by judges and lawyers – presumably, of a given, particular legal system – are "mainly shared". At this point I am not considering whether anyone has ever held any of the semantic theories, or been

the victim of the semantic sting. I am concerned only with Dworkin's failure, both when defining vicious semanticism, and when speaking in his own voice, to distinguish between "the law" (of a particular community, the topic of thought by that community's lawyers and judges) and "law" (a topic of thought of anthropologists, sociologists, other historians, moralists and jurisprudents such as Hart, Kelsen and Dworkin). Dworkin treats "the law" and "law" as synonymous,[13] and I fail to see how he can be so indifferent to the manifest difference between the two terms, corresponding to the difference between the two sorts of intellectual enterprise which I have just indicated.

Positivist and natural law theories in jurisprudence are not, and do not even look like, theories about *the law* of any particular community (in the sense of offering to identify propositions of law which are true for that legal system), or about the criteria for identifying the law which are used by the lawyers and judges of any particular community. They look like theories about what *law* – a(ny) legal system – "necessarily is" (at least in its paradigmatic instantiations, its central cases).

Moreover, such theories are not, and do not even look, "semantic", whether in the sense stipulated by Dworkin or in any other. Austin's "main idea", Dworkin says, was "that law is a matter of historical decisions by people in positions of political power" (36). Hart's, he says, is "that the truth of propositions of law is in some important way dependent upon conventional patterns of recognizing law" (35). Neither "main idea" is semantic.[14]

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[13] E.g., in describing semanticism, he moves – without comment, and in consecutive sentences – from (the assumption that) "we all use the same criteria in framing ... statements about what the law is" to (the assumption that) "we do share some set of standards about how 'law' is used" (32).

[14] The account of Hart is quite inaccurate, too. Dworkin asserts that, according to Hart, the rule of recognition, in whose acceptance lie "the true grounds of law", "assigns to particular people or groups the authority to make law" (34). Consequently, anyone who obeyed Hitler's commands simply out of fear, and who thus did not accept a rule of recognition entitling Hitler to make law, would be committed, according to Dworkin's

Similarly, Dworkin's semantic rendering of natural law theory produces a thesis which natural law theorists have not treated as integral to their theories: "that lawyers follow criteria that are not entirely factual, but at least to some extent moral, for deciding which propositions of law are true" (35).

The truth is that neither positivism nor natural law theory is any more concerned about "how all lawyers use the word 'law'" (36) than Dworkin is.[15] The book's concern about the semantic sting and semantic theories of law seems to me a muddle and a distraction, save in one respect: the discussion of the pseudo-question whether immoral legal systems really count as law. It is the case that some legal philosophers, e.g., Hart, have thought that jurisprudence must make, "once and for all", a choice between a "wide" sense of "law" (such that the Nazis had law) and a "narrow" (such that they did not). Dworkin's discussion brings out well the context- and audience-relativity of statements such as "the Nazis had law" (103–04).[16] Contemporary

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Hart, to say that "no propositions of law were true" in Nazi Germany (35). This overlooks that Hartian rules of recognition are usually multiple, and contain rules which are in no way derived from (even when they are subject to) the supreme rule of change which identifies the people or group with supreme authority to make laws.

[15] As Dworkin quietly concedes in the notes to another chapter, Hart's theory was not controlled by semantic considerations, but by judgments about "what would cure defects in the organization of political coercion that would be inevitable without [special legal] conventions [broadly accepted throughout the community]" (429), and by a view of which concept of law would "facilitate moral reflection" (430). Dworkin's discussion of Raz's positivism is inaccurate. He claims that it "explicitly denies any reliance on political convictions of any sort", and that it "fall[s] back on linguistic rules, to say that this is just what 'law' or 'authoritative' means under any criteria for its application educated lawyers and laymen all accept" (429–30). In the article cited, viz., 'Authority, Law and Morality', *The Monist* 68 (1985): 295–324, Raz in fact denies that he assumes any such conscious unanimity (p. 304) or conceptual clarity (p. 321), and founds his argument on claims about what practices are "servic[e]able" and beneficial (p. 304) and (evaluatively) "important" (p. 320).

[16] See also Finnis, *Natural Law and Natural Rights*, pp. 234–37, 365–66; contrast Hart, *The Concept of Law*, pp. 203, 206–07; *Essays on Bentham*, p. 146.

jurisprudence, in some of its arguments and positions, has indeed suffered somewhat from what I have called "conceptual dogmatism", and Dworkin's protest against that is well taken.[17] But he errs in claiming that the framework self-interpretation of recent jurisprudence is, has been, or can be usefully represented as concerned with or founded upon linguistic agreement, or being in any other way "semantic".[18]

IV.

It is time to attend to Dworkin's theory of law. But there is a bridge between his theory of interpretation and one of the main features of his theory of law "as integrity". The bridge: those pervasive Dworkinian categories, "the best" and "the right".

The task of interpretation, remember, is to make its object *the best* it can be (within its genre), to show it "in the best light possible" (243). The goal of law as integrity, i.e., of the interpretative attitude constitutive of the practice we call law, is to find in every situation of civil dispute *the right* answer which the given civil society's law makes available "in most hard cases" (viii), and which is identified by *the best* interpretation or theory of that legal system. So: "Judges who accept the interpretive ideal of integrity decide hard cases by trying to find,

[17] There has been a good deal of loose thinking, or talk, about "conceptual analysis", explaining "the concept of law", and the like. See, e.g., *Natural Law and Natural Rights*, pp. 278–79. But the malady is not well diagnosed in terms of "semantic theories", *a fortiori* when "semantic" is itself used imprecisely (in the ways mentioned above, and so as to extend even to proposals about how words *should* be used: e.g., *Law's Empire*, 135).

[18] So Dworkin in the end misstates his legitimate point. He says that it is a mistake to ask whether wicked legal systems are law, because the question assumes that its answer turns on whether the linguistic rules we share for applying "law" include or exclude such systems – whereas in fact "we do not share any rules of the kind it assumes" (108). It would have been more accurate to say that while we do share linguistic rules which bear on the question, we can and do use or adapt or discard those rules, intelligibly, when certain contexts make our understanding and our communicative intentions sufficiently clear.

in some coherent set of principles about people's rights and duties, *the best* constructive interpretation of the political structure and legal doctrine of their community" (255; also 262). Law, or "law's attitude", "aims, in the interpretive spirit, to lay principle over practice to show *the best route* to a better future, keeping *the right* faith with the past" (413). "We accept integrity as a distinct political ideal, and we accept the adjudicative principle of integrity as sovereign over law, because we want to treat ourselves as an association of principle, as a community governed by a single and coherent vision of justice and fairness and procedural due process in *the right* relation" (404; also 219, 398).[19]

Now it is true that injustice is done only when *wrong* choice is made in distributions of goods or in other dealings between persons. So, when no wrong is done in such dealings, *a right* answer has been found to a practical problem. But that in no way entails that justice has anything to do with searching for "the right" distribution, or "the right" answer.

Dworkin's efforts to show that a *uniquely* correct ("the right") answer is normally available in a hard case provide an impressive dialectical argument for the contrary and classical view that while there are many ways of going and doing wrong, there are also in most situations of personal and social life a variety of incompatible *right* options – that we should seek good answers, and eschew bad ones, but not dream of *best* ones. Indeed, Dworkin's account of the relations between "fit" and "soundness" in interpretation helps make clear *why*, in any realistic context, no uniquely correct answer could be available in any case where there is identifiable a set of two or more options/answers which do not violate any rule binding on the judge or other chooser or interpreter.

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[19] And justice "is a matter of *the right* outcome of the political system: *the right* distribution of goods, opportunities and resources" (404), while fairness "is a matter of finding political procedures ... that distribute political power in *the right* way" (164; also 404), and procedural due process "is a matter of *the right* procedures ... that promise *the right* level of accuracy..." (165; also 405).

It is important to note that my denial that uniquely correct, or best, answers are available to practical questions has nothing to do with scepticism, internal or external. Nor has it anything to do with the popular argument which Dworkin, as we have seen, is rightly concerned to scorn and demolish, viz., that disagreement is endemic. (The existence of disagreement is a mere fact about people, irrelevant to the merits of any practical or other interpretative claim.) As Dworkin says, "the wise-sounding judgement that no one interpretation could be best must be earned and defended like any other interpretive claim" (237–38).[20] Dworkin himself provides the labour and materials for such a defence.

Nor does my denial rest on the observation that none of us has the "superhuman" powers of Dworkin's Hercules. Hercules himself, no matter how superhuman, could not justifiably claim unique correctness for his answer to a hard case (as lawyers in sophisticated legal systems use that term). For in such a case, a claim to have found the right answer is senseless, in much the same way as it is senseless to claim to have identified the English novel which meets the two criteria "shortest and most romantic" (or "funniest and best", or "most English and most profound").[21] Two incommensurable criteria of judgment are proposed – in Dworkin's theory, "fit" (with past political decisions) and "justifiability" (inherent substantive moral soundness). A hard case is hard (not merely novel) when not only is there more than one answer which violates no applicable rule, but the answers thus available are ranked in different orders along each of the available criteria

[20] In the context, however, Dworkin seems to treat "no interpretation could be best" as equivalent to: no interpretation is worthwhile because none can be identified as bad. I endorse the sentence quoted only in its literal meaning.

[21] Of course, it is conceivable that a novel might happen to be both the most romantic and the funniest. In any realistically rich field, such as the English novel, this cannot be expected and the injunction to look for such a novel is practically senseless.

of evaluation: brevity, humour, Englishness, fit (integrity),[22] romance, inherent "quality", profundity, inherent "justifiability",[23] and so forth.

In earlier works, Dworkin tried to head off the problem of incommensurability of criteria by proposing a kind of lexical ordering: candidates (theories of law) must fit *adequately*, and of those which satisfy this "threshold" criterion, that which ranks highest in soundness is "*the best*" even though it fits less well than (an)other(s).[24] This solution was empty, for he identified no criteria, however sketchy or "in principle", for specifying when fit is "adequate", i.e., for locating the threshold of fit beyond which the criterion of soundness would prevail. Presumably, candidates for "the right answer" to the question "When

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[22] Cf.: "questions of *fit* surface again, because an interpretation is *pro tanto* more satisfactory if it shows less damage to *integrity* than its rival" (246–47). Is it not surprising to find "integrity" denoting both the overall virtue of the whole interpretative/legal enterprise and one of the "dimensions" of that enterprise? Dworkin's reply seems to say that because commitment to integrity makes no sense without commitment to fairness and justice, every legal effort to be fair and just "flows from [an] initial commitment to integrity" (263). *Non sequitur.*

[23] Is it not fishy to find 'justifiability", an inherently framework concept, denoting *one* of the dimensions or criteria, when the other criterion, "fit", it itself inherently evaluative, i.e., justificatory? "Best and shortest" is similarly dubious, insofar as brevity is commonly accounted a virtue in novels. Of course, even when brevity is treated as a mere neutral fact, the quest for the best and shortest will still be chimerical in any realistically rich and complex field of candidates.

[24] See *Taking Rights Seriously*, pp. 340–41 (where Dworkin expressly envisages the only really interesting and genuine form of hard case or contest between theories or interpretations of the law as a case where the rank order in terms of fit of alternatives which all fit "adequately" is different from the rank order in terms of soundness), 342, 360, also 122; *Ronald Dworkin and Contemporary Jurisprudence* (1984), p. 272. In the third of these passages, Dworkin refers also, as if it were equivalent, to the account given in 'Is There Really No Right Answer in Hard Cases?' *New York L. Rev.* 53 (1978), now *A Matter of Principle* (1985) at 143; but there the story is that political/moral soundness comes into play if, and, it seems, only if, "two justifications [scil. theories of law, interpretations, answers] provide an *equally* good fit with the legal materials" (emphasis added).

is fit adequate?" would themselves be ranked in terms both of fit and of soundness. An infinite regress, of the vicious sort which nullify purported explanations, was well under way.

In *Law's Empire*, Dworkin abandons the simple picture of a lexical ordering between the dimensions of fit and soundness. He stresses that within the second dimension "questions of fit surface again, because an interpretation is *pro tanto* more satisfactory if it shows less damage to integrity than its rival" (246–47); "even when an interpretation survives the threshold requirement, any infelicities of fit will count against it ... in the general balance of political virtues" (256; see also 257). This is a gain in moral realism. But it strips away the last veil hiding the problem of the incommensurability of the criteria proposed for identifying a best or uniquely right interpretation, theory or answer. We are left with the metaphor: "balance" – as in "the general balance of political virtues" embodied in competing interpretations. But in the absence of any metric which could commensurate the different criteria (the dimensions of fit and inherent moral merit), the instruction to "balance" (or, earlier, to "weigh") can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and *choose*.

It is a feature of the phenomenology of choice that after one has chosen, the factors favouring the chosen alternative will usually seem to outweigh or overbalance those favouring the rejected alternative(s).[25] The chosen alternative will seem to have a supremacy, a unique rightness. But the truth is that the choice was not *guided by* "the right answer", but rather *established* it in the sentiments, the dispositions, of the chooser. When the choice is that of the majority in the highest relevant appeal court (a mere brute fact), the unique rightness of the answer is established not only for the attitude of those who have chosen it, but also for the legal system or community for which it has thus been authoritatively chosen and laid down as or in a *rule*.

In the real world, of course, the problem of commensurability is much more intense than I have portrayed it; for there is not just one

[25] See Germain Grisez, "Against Consequentialism", *Am. J. Jurisp.* 23 (1978): 21–72 at 46–47.

dimension of soundness or substantive political justifiability, but many incommensurable dimensions. Their incommensurability is profoundly important for ethics and political, not merely for legal, adjudication. It has not been sufficiently noted, in debate on Dworkin's work, how thoroughly he shares utilitarianism's deepest and most flawed assumption: the assumption of the commensurability of basic goods and thus of the states of affairs which instantiate them. And this assumption is not marginal to his theory of law, as his denial of absolute rights,[26] though important, can perhaps be said to be marginal; it is of its essence.

In sum: there are countless ways of going wrong in a hard case; the judgment that Mrs. McLoughlin and her legal advisers should be summarily executed and their property distributed to the defendant can head a list of possible but erroneous judgments which has no end. A case is hard, in the sense which interests lawyers, when there is more than one right, i.e., not wrong, answer. Dworkin's discussion of the two dimensions has made this clearer than ever.

The objection I have made in this section is not, I think, confronted in the book. Instead, Dworkin imagines and responds to some related objections which are easy to handle because exaggerated and ill-focussed. "There can be no best interpretation when more than one survives [the] test [of fit]"; therefore Hercules' claim to be enforcing *the law* is fraudulent, or grammatically wrong, or confusing (261, 262). Dworkin's reply? First, Hercules' claim could be grammatically wrong only if the semantic sting were truth rather than error. That we should accept. Second, Hercules' claim would be fraudulent only if he did not share Dworkin's view that the judgments made by each judge in a hard case are intended to state what the law is, not merely what it should now become. That, too, we should accept; deception is not an issue in jurisprudence.

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[26] *Taking Rights Seriously*, p. 354. On incommensurability, see Raz, *The Morality of Freedom* (1986), ch.13; Finnis, *Natural Law and Natural Rights*, pp. 112–18 (and see pp. 223–26 on absolute rights); *Fundamentals of Ethics*, pp. 86–93; Finnis, Grisez and Boyle, *Nuclear Deterrence, Morality and Realism* (1987), pp. 241–54, 267–70, 286–87 (and see pp. 286–87 on moral absolutes).

But to the charge that Hercules' claim is confusing, Dworkin makes no reply. And the claim *is* confusing (and confused), precisely because (for the reasons I have been setting out, and not for the bad, sceptical, or external reasons which Dworkin envisages as objections), in a hard case, in legal systems like ours, there will be no one answer which, because uniquely right, should be described as "*the law* governing the case". Moreover (though the descriptive sociology of all this is a secondary issue), Hercules' claim obscures the reality that conscientious judges do acknowledge that they are making new law, breaking new ground – interstitially, no doubt, and usually by a "development" which respects and makes use of existing legal concepts and normative resources with an exclusiveness foreign to the legislature's ventures in law-making – but for all that, by choice, a new commitment, not mere discovery and application. To describe a conscientious judgment in a hard case as legal rather than moral is not wrong, for such a judgment will be both constrained and shaped by existing law in a way quite unlike any other moral judgment.[27] But to deny the difference between application and development, easy cases and hard cases in the sense I have specified, is indeed misleading.

Dworkin is right to insist that the answers to easy cases, too, presuppose conceptions of fairness and justice (354), and in *that* sense he is right to consider easy cases "only special cases of hard ones" (266). But he has no valid argument against the commonsense of lawyers and others who think that in some cases there is only one answer which is not wrong, while in other (not infrequent) cases there is more than one such answer, and reason itself (whether legal or even moral) lacks the resources to identify one as best.

V.

A primary and perennial source of the need for authority (including what Dworkin calls "convention") is the rich variety of eligible – i.e.,

[27] But, unlike Raz and Dworkin, I don't care whether these judgments are called judgments of law or not: see *Natural Law and Natural Rights*, p. 290.

not wrong – but incompatible answers to issues of choice[28] in social life.[29] I have already observed, in section I above, how Dworkin's attention is diverted from the constituent and legislative moments of law's "practice". Similarly, it is diverted from the question of political and legal authority's ultimate justification and legitimacy. We come upon law half-way through the story; the "most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way..." (93).[30] But why acknowledge the "power" of "government" at all? *For what* should a ruler be exercising his power?

The book does offer a defence of the legitimacy of political authority. But it is very thin. It consists centrally of the claim that denying political legitimacy (Dworkin's term for what I would call justified authority) entails denying, implausibly, the legitimacy of all other associative obligations, i.e., the obligations which arise from family, friendship and other fraternal relationships (see 207). A principal weakness of this argument, as developed in the book, is that these other fraternal associations are characteristically founded upon shared interest in substantive human goods, whereas the political community, so far as Dworkin invites us to envisage it, eschews any official concern – certainly any imposition of obligations on the basis

[28] It is hazardous to call such issues "problems", a phrase which seems to suggest that the major issues of personal or social choice should be understood on the analogy of mathematical or technical problems which commonly do have a uniquely correct or best solution; the tendency to see life as a series of *problems* is doing major damage to Western morality and civilization.

[29] See *Natural Law and Natural Rights*, pp. 231–33. Of course, there are other primary sources of the need for authority: the transaction costs of negotiation and deliberation; selfishness, malice, etc.

[30] Sometimes Dworkin speaks as if "if law exists it provides a *justification for* the use of collective power against individual citizens or groups" (109, emphasis added) and says that "the ultimate point of law is to license *and justify* state coercion..." (127, emphasis added). But the initial statement (at 93) is truer to his account, which is of law as a *constraint upon* the exercise of authority.

of such concern – for substantive human goods such as health, knowledge, beauty, the transmission of human life and culture, and so forth. In this respect, the book, while it differs from Dworkin's earlier books by abstaining from explicitly (but cf. 274) describing itself as "liberal", retains the salient characteristic of Dworkinian liberalism: it portrays justified politics, and thus law, as neutral about what is truly worthwhile and what worthless in human life.[31] It lacks any articulated concept of the common good, an ensemble of conditions which favour the human flourishing (including rights) of all members of the community, and which ought to be promoted as well as respected by those in authority, and for the sake of which others acknowledge that authority.

The other principal weakness in Dworkin's account of legitimacy or authority is that his discussion of the problem of securing any desirable degree of *co-ordination* of human action in community is buried in his polemic against "conventionalism" (see 144–50). Now I have no brief for (or against) conventionalism, an imaginary doctrine[32] which Dworkin envisages as the substantive political/jurisprudential counterpart (432) to the semantic theory he calls "positivism".[33] I will, however, observe in passing that his critique of

[31] The unwillingness to speak of goods or harms is remarkably far-reaching. Thus, in the discussion of negligence, where we would expect a reference to harms we find only a reference to rights: see 293; cf. 307, 309, where, at last, the categories "fundamental interests" and "damage – e.g. threats to life" are acknowledged.

[32] Conventionalism, though imaginary, is presented in loaded terms: see 95, 135.

[33] Dworkin admits that perhaps no one has ever subscribed to conventionalism precisely as he describes it (94). But I doubt whether anyone significant subscribes to anything even resembling Dworkin's conventionalism, the key tenet of which is that "the past yields no rights tenable in court, except as these are made uncontroversial by what everyone knows and expects" (118). To claim that "if convention is silent there is no law" (118) is a far cry from asserting that the past has no justificatory "power over the present" of a kind highly relevant to the judge's proper exercise of his judicial power and in that sense "tenable in court" – an assertion few indeed have made, even those who have unwisely spoken of judicial "discretion" when the law runs out.

conventionalism (147–50) is very weak. For he simply enrolls "pragmatism" to make the response, and purports to endorse a pragmatist claim that pragmatism is more "efficient" at coordinating citizens' actions because "it is so much more adaptive" (149). He himself will rightly later argue, in effect, that pragmatism is unwarranted in taking efficiency as the criterion or model of political justification.

But my present point is simply this: Dworkin's theory of law, and of law's authority or legitimacy, is weakened by his failure frankly to acknowledge the case, not merely for making "past politics decisive of present rights" in accordance with an ideal and virtue of "integrity", but for creating and applying *rules* whose legal and moral authority is directly and simply ascribed to their *source*, authoritative enactment or judicial adoption or some other form of "convention".[34] In attending to the fact of consensus – so fundamental to the existence and worth[35] of legal systems, and of a community's judiciary – Dworkin

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[34] Dworkin's text leaves me in doubt about whether he takes the conventions with which "conventionalism" is concerned to be quasi-constitutional conventions defining broad institutions such as legislation, Congress, precedent, etc., or whether he takes them to include also particular institutions and rules established under those constitutional conventions. Much in the text suggests the former, but other passages are consistent with the latter, and at least one seems to require it: "Suppose there is a convention in some legal community that judges must give both sides an equal opportunity to state their case" (123).

[35] Many will think that Dworkin's emphasis on consistency with the past (*passim*), and on demanding that a principle given effect to in one part of law should "flow throughout the scheme" of the law (436), should have been balanced by a clear recognition (clearer and earlier than 401) of the worth of having clear rules (and loyal adherence to them) for securing that litigants are treated uniformly at a given time, and so do not suffer more than is inevitable from the excruciating sense that if their case had been tried *on the same day* by the judge next door it would probably have been determined differently (e.g. because each judge is attempting the impossible and all-too creative interpretative task envisaged for him by Dworkin, instead of applying the rules). Is it symptomatic that the book contains some big mistakes in reporting precedents to which it refers, (notably (2) *Attorney-General* v. *Jonathan Cape Ltd* [1976] Q.B. 752; and (185) *Roe* v. *Wade* 410 U.S. 113); and some implausibly dismissive opinions about

tries to make us choose between basing that consensus on convention – which means treating legal propositions as true "just because everyone else accepts them" (136) – or on "consensus of independent conviction", "the way we all accept that it is wrong to torture babies or to convict people we know are innocent" (136). This disjunction between convention and consensus of conviction, so defined, is entirely inadequate to explain and justify legal authority, institutions and obligation. We should refuse to make this choice. But if we were forced to choose, a sound natural law theory would have no hesitation in tracing the legal and thus the moral authority of most of the law's rules and institutions (the establishment, though not the content, of which is urgently required for the sake of fairness and the other components of the common good) not to consensus of independent conviction but to *convention*.[36]

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the *integrity* (as distinct from the justifiability in principle) of certain rules, such as the one giving immunity in tort to barristers in court (cf. 220, 401), or forbidding the *importation* of slaves only after a 20-year run-off period (184)? The horizon is ordinarily not the best focus for the judicial gaze.

[36] See *Natural Law and Natural Rights*, 281–90; 'The Authority of Law in the Predicament of Contemporary Social Theory', *Notre Dame Journal of Law, Ethics and Public Policy* 1 (1984) 115–37.